(17)

No. 96-643

In The

Supreme Court of the United States

October Term, 1996

THE STEEL COMPANY, a/k/a
CHICAGO STEEL AND PICKLING COMPANY,

Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

SANFORD M. STEIN
Counsel of Record

LEO P. DOMBROWSKI
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

We have shown in our opening brief (Pet. Br. 14-34) that, based on EPCRA's language, EPCRA's place in federal environmental law, and the basic purposes of environmental citizen suits, Congress did not intend to authorize citizens to seek penalties for EPCRA violations that were cured before the citizen suit was filed. Respondent cannot overcome this logical conclusion to find congressional authorization for its suit. We have also shown (Pet. Br. 34-41) that respondent cannot satisfy bedrock Article III standing requirements, something that Congress cannot waive. Respondent asks this Court to discard its settled line of Article III law and find standing to sue where an environmental citizen plaintiff cannot allege an ongoing violation.

I. EPCRA'S "PLAIN LANGUAGE" DOES NOT AUTHORIZE RESPONDENT'S SUIT FOR PAST VIOLATIONS

A. Contrary to respondent's claims, Congress did not intend to authorize citizen suits for past EPCRA violations. It did not depart from its customary citizen suit model when it enacted EPCRA, and nothing in the statute or legislative history indicates Congress intended to grant citizens greater enforcement authority under EPCRA than it has under other environmental statutes.[1]

Although respondent argues the starting point for the interpretation of EPCRA's citizen suit provision should be the language of the statute itself (Br. 10), it conspicuously elects not to address the restrictions on a court's jurisdiction (Pet. Br. 21-22):

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[1] By claiming throughout its brief that The Steel Company "ignored" EPCRA, Br. 7-10, 19-20, 26, respondent attempts to cast petitioner as a "bad actor" out to flout our nation's environmental laws. Respondent has no basis for its allegations because they are, of course, untrue. In a study cited by respondent, Br. 2-3, the GAO found almost all non-reporting to be unintentional and concentrated among small and medium size manufacturing facilities that were simply unaware of EPCRA's requirements. *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 51-52 (June 1991) GAO/RCED 91-121. The Steel Company, a small manufacturing company, was unaware of EPCRA's requirements when it received respondent's notice of intent to sue.

> The district court shall have jurisdiction in [citizen suits] to enforce the requirement concerned *and* to impose any civil penalty provided for violation of that requirement.

42 U.S.C. § 11046(c) (emphasis added). In *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), found virtually identical language in the CWA ("to enforce such an effluent standard . . . and to apply any appropriate civil penalties," 33 U.S.C. § 1365(a)(2)) compelling in holding that Congress did not intend to authorize citizen suits for past CWA violations:

> [CWA's citizen suit provision] does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referenced to in the same subsection, even in the same sentence. . . . A comparison of [the relevant CWA sections] thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit to enjoin or otherwise abate *an ongoing violation*.

Id. at 58-59 (emphasis added). By using the same provisions in EPCRA and the CWA, Congress demonstrated it simply did not intend to provide citizens with the same enforcement authority as the government.

B.1. Respondent argues that because Congress used the "alleged to be in violation" language when it enacted CERCLA's citizen suit provision, while using the "failure to" formulation in EPCRA, this Court should infer a major sea change behind Congress's intentions for citizen enforcement. Br. 13, citing *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994), for the proposition that CERCLA and EPCRA should be read as a single statute. First, CERCLA and EPCRA are not different sections of the same statute, but different statutes with different goals and requirements. It is therefore not surprising that Congress used different language in each and in neither used language that attempts to provide citizen jurisdiction over past violations.

Second, the Seventh Circuit's and respondent's idea that Congress used "under" as a shorthand method to incorporate all the substantive requirements of Sections 312 and 313 and subject them to citizen enforcement on the same level as government enforcement authority is highly doubtful. *See* Pet. App. A11, Br. 10-12.

"The word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 135 (1991). One meaning of "under" is "by reason of the authority of." *Id.* Another is "required by." *Webster's Third New Int'l Dictionary* 2487 (1993). Seen in this light, especially in the context of *Gwaltney* and Congress's characterization of citizen suits as injunctive measures, the proper inference is that Congress did not intend to authorize citizen enforcement for all the substantive requirements of Sections 312 and 313, but rather intended citizens to sue for a failure to file forms "under," *i.e.*, "required by," those sections if the failure is not cured by the time the citizen files suit. *See also Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473, 475 (6th Cir. 1995).

Respondent attempts to counter this inference by arguing that if the sections' filing deadlines are not incorporated by the use of the word "under," then, under the same analysis, "filing blank forms, or forms containing information that the owner knew to be inaccurate" would likewise bar an EPCRA citizen suit. Br. 11-12. The error of respondent's argument was explained by this Court in *Gwaltney*: the language and legislative history of citizen suit provisions indicate that there must be an ongoing violation when the citizen complaint is filed. Should a party file blank forms or forms containing inaccurate information under any environmental statute (and thereby also invite a government enforcement action), the citizen can allege an ongoing violation and invoke federal court jurisdiction. For example, if a party subject to the CWA filed either blank or inaccurate Discharge Monitoring Reports after receiving a citizen's notice in an attempt to avoid a citizen suit, the citizen could allege, if not cured before the notice period expired, an ongoing violation. In enacting EPCRA, Congress made no exceptions to its model and thus did not intend to have EPCRA operate differently from the CWA or other citizen suit provisions.

2. Even respondent acknowledges the harshness of allowing citizens to exhume old and since corrected EPCRA violations and file suit, and suggests the Court need not reach the question of whether EPCRA allows such suits. Br. 16. Respondent distinguishes its action from any such "exhumation" by contrasting the notice and venue provisions and discerns a bright line by which

Congress meant to permit EPCRA citizen suits if the violation is continuing when notice is sent, but otherwise apparently intended to bar a citizen suit if the violation was corrected prior to notice.

Had Congress intended to so carefully circumscribe citizen enforcement, as respondent suggests, one would expect a clear indication to support the demarcation respondent sees. Additionally, far from helping respondent, its bright-line approach wholly undermines its principal argument, made here and below, that a party who fails to file EPCRA reports by March 1 and July 1 of each year is subject to citizen enforcement with no exceptions. For, according to respondent, EPCRA's "plain language" provides that once the reporting deadlines are missed, a party remains subject to citizen enforcement even if the failure to file is cured. Respondent's main argument thus calls for interpreting EPCRA to reach all past violations, no matter how small or remote, something very different from Congress's purpose in authorizing citizen enforcement.

3. In our opening brief, we survey the evolution of environmental citizen suits and show that Congress used the citizen suit provision it created in 1970 as a model for all other environmental citizen suits. We also point out that when Congress wants citizens to be able to sue for violations existing at the time notice is sent or for violations cured prior to notice, it does so unambiguously in two ways: Congress either authorizes citizens 1) to sue immediately upon providing notice, *see, e.g.*, 42 U.S.C. § 6972(b)(1)(A) (for hazardous waste violations); or 2) to sue for past violations even if cured prior to notice, 42 U.S.C. § 7604(a)(1) (citizen may sue a party "alleged to have violated" a requirement).[2] Pet. Br. 14-20. Respondent urges this Court to ignore these clear indications that Congress knows how to structure a citizen suit provision so that the notice period does not operate as an opportunity to cure and, instead, to read the ambiguous "failure to submit under" like these clear formulations in other statutes, an unsupportable interpretation. Respondent's concern that reversal of the Seventh Circuit will curtail EPCRA citizen suits thus is a matter to be addressed to

[2] In our opening brief, we point out the constitutional problems with the CAA formulation. Pet. Br. 41 n. 18.

Congress, for Congress, if it sees fit, can structure the notice period so that it cannot bar a citizen suit.

Had Congress wanted EPCRA's citizen suit provision to operate differently from its model, it no doubt would have so indicated either in the statute or legislative history. The Court should not assume that Congress meant to institute a substantive change without explanation. *See Ardestani*, 502 U.S. at 136-37; *see also Shaw v. Merchants Nat'l Bank*, 101 U.S. 892, 894 (1880) ("No statute is to be construed as altering the common law further than its words import.")

Respondent also seeks support for its expansive reading in this Court's recent interpretation of the Endangered Species Act's citizen suit provision. Br. 13-15, citing *Bennett v. Spear*, 117 S. Ct. 1154 (1997). Noting that the Court commented on the "remarkable breadth" of the ESA's "any person" formulation, respondent stretches the Court's holding to conclude that EPCRA's "any person" should somehow allow suits for past violations. Br. 15. The Court was addressing, however, whether Congress's use of "any person" eliminated prudential standing barriers to suits by ranchers and irrigation districts – non-traditional ESA plaintiffs – an issue that lends no support to respondent's position.

Moreover, as explained below, interpreting EPCRA to allow citizen suits for past violations would create serious constitutional problems and thus violate this Court's well-established rule that a statute should be construed to avoid constitutional questions "when it is fairly possible to do so." *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2237 (1995) (O'Connor, J., concurring). This canon of statutory construction "reflects a judicial presumption concerning the intent of the draftsmen of the language in question." *Regan v. Time, Inc.*, 468 U.S. 641, 697 (1984) (Stevens, J., concurring in part and dissenting in part). Rather than presuming that "Congress, which also has sworn to protect the Constitution, would intend to err on the side of" legislating within the bounds of the Constitution, *id.*, respondent would have this Court find that Congress intended to draft EPCRA to find citizen jurisdiction over past violations and thereby repudiate Article III's standing requirements. *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional

thickets in the absence of firm evidence that it courted those perils.")[3]

C.1. Respondent is mistaken that we argue the "only reason for a notice requirement is to permit a violator to come into compliance." Br. 17. In fact, we devote seven pages to the principle that the notice provision has *two* purposes: to prompt either voluntary compliance or government enforcement, thus obviating the need for citizen suits. Pet. Br. 14-20.[4] Respondent is thus correct that in amending the CAA to permit suits for past violations, yet leaving the notice provision intact, Congress intended the notice provision "to have other purposes besides allowing potential defendants to cease their violations." Br. 17 (again acknowledging the Court's *Gwaltney* holding that the notice period operates as an opportunity to cure). The other purpose is to allow EPA an opportunity to decide if it wishes to exercise its enforcement discretion.

Respondent claims the notice period is also intended to serve a third purpose: to allow for settlement discussions. Br. 18. Faced with a suit to which there is no defense, however – diligent compliance after notice meaning nothing to the citizen plaintiff bent on "punishment" – a party finds itself in something far different from an arms' length negotiation. Faced with potentially ruinous penalties and a large attorney's fee award, a business

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[3] Respondent refuses to acknowledge this principle and thus how statutory construction is intertwined with constitutional standing: Congress is simply presumed to legislate within constitutional bounds. With this principle in mind, it is hardly surprising that, although EPCRA's "any person" formulation lacks the explicit Article III limitation Congress used in defining "any citizen" under the CWA (a person "having an interest which is or may be adversely affected," 33 U.S.C. § 1365(g)), Congress gave no indication it thought it may be departing from its customary citizen suit model to test the limits of its constitutional authority.

[4] Respondent itself concedes that one purpose of the notice provision is to provide an opportunity to come into compliance. Br. 17 (notice period has other purposes "*besides* enabling a violator to come into compliance." (emphasis added)). Legislative history cited by amici reinforces the notion that Congress intended citizens "to provide a prod," which is what respondent's notice accomplished here. Br. of NRDC et al. 22.

invariably finds itself compelled to yield to the citizen group's demands.

Respondent also suggests the notice period might allow a prospective defendant to inform the would-be citizen plaintiff a suit would be baseless, thus avoiding litigation. Br. 18. Such a scenario begs the question of how the citizen could have sent such a notice in good faith if a suit would be baseless, a notion Congress could not have had in mind when it created the notice provision. Respondent's citation to the Federal Tort Claims Act, Br. 18, is also unavailing as that Act involves claims for personal or property injury – something far different from allegations of environmental violations – where the government obviously could not come into "compliance" after receiving notice of a claim.

2. And what should the main goal of a citizen suit be, and thus of a citizen group, but to prompt compliance? Respondent, however, asserts that if the Seventh Circuit is reversed, citizen groups will "lose much of their incentive, and financial ability" to seek EPCRA compliance. Br. 20. "Because nearly all defendants will come into compliance once they receive notice," respondent laments, EPCRA litigation will be curtailed. *Id.*

Thus, on its face, respondent's desire that businesses comply with EPCRA so that information is available to the public appears to be a poorly disguised plea to obtain attorneys' fees. For if EPCRA's goals are so important to it, should respondent not be satisfied when a party quickly comes into compliance upon receiving an EPCRA notice? And with its 30,000 members and over 180,000 contributors, J.A. 4, should respondent not gladly consider its costs of investigation money well-spent, because its efforts prompted compliance, reserving costly litigation as a last resort?[5]

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[5] Respondent states that citizens "seldom have complete access to information" about a facility's chemical use and emissions (Br. 18), and implies the citizen's burden in identifying EPCRA violators is a heavy one. But, as today's sources of information are numerous and extensive and provide citizens with a wealth of data on industrial facilities, a citizen's costs of investigation cannot be significant. A host of precise environmental reporting requirements under numerous environmental statutes other than EPCRA requires facilities to submit permit applications,

Far from being "of little or no use," Br. 12, filed reports provide valuable information to local emergency planning agencies and the public, information that would not be available had the facility remained unaware of EPCRA's requirements.

II. BECAUSE CONGRESS CANNOT LEGISLATE OUTSIDE THE BOUNDS OF THE CONSTITUTION, ARTICLE III BARS RESPONDENT'S SUIT FOR PAST VIOLATIONS

Respondent opens its standing section by stating The Steel Company's "argument on this point gives no hint of how far-reaching its claim is," asserting its suit is "authorized by an Act of Congress, and it is extremely rare for this Court to rule that Congress has exceeded the bounds of Article III." Br. 22. Despite respondent's intimation that The Steel Company's challenge to its standing is somehow remarkable, one would think it settled that Congress cannot expand constitutional standing. This Court applied that bedrock principle in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and, while acknowledging that Congress may, of course, create "legal rights, the invasion of which creates standing," *id.* at 578, the Court simply objected to Congress's eliminating the Article III injury requirement.

Respondent does not suggest the Court abandon Article III standing requirements altogether, but in arguing that this Court should allow its suit for past violations to continue, it asks this Court to engage in extraordinary judicial activism and reject its well-established line of Article III standing cases and apply mootness principles instead. It offers this novel approach because it cannot escape Article III's requirements that: 1) a citizen's alleged injury be ongoing when suit

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waste generator reports, waste manifests, spill reports, chemical substance inventories, air emissions inventories, underground storage tank records, and numerous other documents. All of this information is available through Freedom of Information requests. Much of it is also available on computer databases.

is filed; and 2) its requested relief redress the alleged injury in some personal fashion.

A. Respondent Has No Article III Injury Because The Steel Company Was in Compliance with EPCRA When Respondent Filed Its Complaint

1.a. In an effort to give its standing argument historical underpinnings, respondent suggests that this Court "has consistently acknowledged the constitutionality of informer's actions, or qui tam actions. . . . This long-standing and consistent endorsement of the qui tam action is especially significant because" this Court has said Article III requirements "draw their content from tradition and common understanding[s]." Br. 29, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). And since qui tam actions have been with us since the First Congress, and before that for hundreds of years in England, respondent contends that its "standing follows a fortiori from the qui tam cases." Br. 29-30.

In reality, this Court has never squarely addressed the constitutionality of qui tam statutes. *See, e.g., United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 618 (C.D. Cal. 1989). Additionally, that qui tam statutes have been in existence since the founding of our country "is not independent evidence of their constitutionality." *Id.* Many acts of the early Congresses would be held unconstitutional if they came before the Court today. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 814 n. 30 (1983) (Brennan, J., dissenting) (cautioning reliance on historical arguments and referring, among others, to law of First Congress requiring public whipping of persons convicted of certain crimes). While this Court may one day use qui tam's historical pedigree as a factor in finding such actions constitutional, history cannot save respondent's action. Because the history of the qui tam and, especially, of the environmental citizen suit, do not support its action, respondent is left with no choice but to ask this Court to rewrite its law of constitutional standing.

In addition to this Court never having addressed the issue, respondent's confidence in the constitutionality of the

qui tam action is far from universally shared. For example, the Department of Justice's Office of Legal Counsel has argued the qui tam provisions of the False Claims Act are unconstitutional. *Memorandum to Attorney General Richard Thornburgh from William P. Barr*, July 18, 1989, *reprinted in Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy*, at 161-197 (National Legal Center for the Public Interest, 1996). The OLC found little evidence of historical acceptance of qui tam actions:

> A fair reading of the history of qui tam in the United States reveals it as a transitory and aberrational device that never gained a secure foothold within our constitutional structure because of its fundamental incompatibility with that structure.

Id. at 167. Far from lending support to respondent's standing argument, qui tam's "common understandings" indicate anything but a solid line of tradition, and, as shown below, respondent has a far inferior "warrant [for] invocation of federal-court jurisdiction," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), than the constitutionally suspect qui tam plaintiff.

b. Respondent also contends its suit is far removed from any effort "to transfer from the President to the courts the Chief Executive's most important Constitutional [sic] duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." Br. 23, citing *Defenders*, 504 U.S. at 577. The blending of Article II, Article III and separation-of-powers concerns are no less relevant here than in *Defenders*. *See* 504 U.S. at 576-78. By seeking penalties for alleged wholly past violations, for which it has no Article III standing, respondent is asking this Court to transfer to it the Executive's discretion to seek penalties for those violations. Respondent cannot, therefore, be acting on its own behalf, but instead on behalf of the government and the public at large. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (private parties have no judicially cognizable interest in procuring the enforcement of law by an administrative agency).

In *Gwaltney*, the United States recognized this troubling prospect:

> Indeed, if Congress were to give private citizens untrammeled authority to seek penalties for wholly past violations – oblivious to Article III's requirement that a litigant have a personal stake in the controversy – it would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.

Brief of the United States as Amicus Curiae Supporting Affirmance at 21 n. 34, *Gwaltney*, 484 U.S. 49 (1987).[6] Here, respondent, with the United States' support, asks that the courts be authorized "with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department,' and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.' " *Defenders*, 504 U.S. at 577 (citations omitted). The question of who exercises enforcement discretion would be transferred from the executive branch to the federal courts.

2. Although respondent agrees that whether subject matter jurisdiction exists "depends on the state of things at the time of the action brought," *Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring) (quoting *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824)), it initially questions whether this is a constitutional principle or one of statutory construction. Br. 34. By so doing, respondent ignores this Court's holdings that the case or controversy requirement demands that a plaintiff's injury be continuing at the time suit is filed. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1974).[7] Because Congress cannot alter Article III's requirements, *see, e.g.*, *Raines v. Byrd*, 65 U.S.L.W. 4705, 4708 n. 3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a

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[6] Although the United States squarely addressed this issue ten years ago, it is conspicuously silent on the issue here.

[7] Later in the same paragraph, however, respondent acknowledges "Article III requires that a case be 'an actual case or controversy' at the time of its decision, not just 'when suit was filed.' " Br. 34, citing *Honig v. Doe*, 484 U.S. 305, 317 (1988).

plaintiff who would not otherwise have standing."), the "relevant analogy" cannot be to "Congress's power to prevent efforts to circumvent jurisdictional requirements," Br. 34, but must be to Article III itself.

Respondent attempts to sidestep this Court's jurisprudence on Article III injury by concluding "It is beyond serious dispute" that The Steel Company's alleged omissions satisfy the "injury in fact" element of the standing test. Br. 23. Nonetheless, respondent conspicuously makes no attempt to, and cannot, dispute that no injury existed at the time it filed its complaint. Pet. Br. 36. Instead, respondent refers solely to events that occurred prior to filing in an attempt to establish an injury and is forced to admit that any alleged injury was wholly past and noncontinuing: respondent "alleg[ed] a wrong *in the past*," The Steel Company allegedly "*inflicted* injury on CBE." Br. 23 (emphasis added).[8] Even respondent concedes that EPCRA is best interpreted to mean that a violation ceases when a late report is filed. Br. 14 & n. 9. Respondent simply cannot point to any alleged injury existing at the time it filed its complaint, and it is thus clear beyond dispute that when The Steel Company filed its forms in May 1995, three months before respondent filed its complaint, respondent lost any Article III foundation on which it could base its suit. *See also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 346-47 (1980) (Powell, J., dissenting)

[8] Although irrelevant to its standing argument, respondent is mistaken that it was unable to include The Steel Company's emissions in its most recent *Guide to Southeast Chicago's Major Polluting Industries*. Br. 26. Respondent received The Steel Company's EPCRA forms both during settlement discussions in May 1995 before CBE filed its complaint, and again during the litigation in October 1995, well before it finalized its *Guide*. (Although the *Guide* is not dated, the inside cover states the cover photo was taken on April 26, 1996.) Besides, the very title implies that the facilities included are guilty of some wrong. The Steel Company operates pursuant to lawfully issued permits and regulations, and thus under legal authority. If the other facilities in the *Guide* operate the same way, perhaps it should be renamed *Guide to Southeast Chicago's Major Environmentally Compliant Industries*.

(this Court has routinely held that "a tender of full relief remedies a plaintiff's injury and eliminates his stake in the outcome.")[9]

Perhaps realizing the consequences of its not being able to allege an ongoing injury, respondent concludes there must be a "continuing live dispute on the merits" merely because the parties disagree as to whether The Steel Company is liable for civil penalties. Br. 30 n. 16. The requirements of Article III are not satisfied, however, because a party asks a court to declare its legal rights. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). Once The Steel Company filed its forms, there ceased to be any continuing dispute between the parties. Respondent cannot compel a court to decide a hypothetical case (how much in penalties The Steel Company should pay to the U.S. Treasury) just to secure its attorneys' fees.

B. Respondent Cannot Satisfy the Requirement of Redressability

1.a. Respondent's redressability argument is extraordinary; it urges this Court to abandon its Article III standing doctrine and replace it with one of mootness. Respondent finds support for its argument in this Court's holdings that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Br. 32, citing *Northeastern Florida Chapter, Associated Gen. Contractors v. Jacksonville*, 508

[9] Respondent even claims that it still would have been injured had The Steel Company filed its forms prior to May 1995. Br. 37 (respondent had to conduct "a more expensive" investigation because of the non-filings). Respondent claims further injury because any alleged non-compliance resulted in exposure to "additional toxic chemicals." Br. 27. Here respondent attempts to convert a reporting statute into one like RCRA, CAA, or CWA, which are intended to protect the public from actual harm.

U.S. 656, 662 (1993). Respondent does first admit the voluntary cessation principle involves litigation that has already begun and acknowledges it does not follow that there should be a judge-made "voluntary cessation" principle to permit standing. Br. 32-33. But it then offers the novel argument that since standing and mootness are both Article III doctrines, "by the same token, Article III should not be construed to bar Congress from applying a 'voluntary cessation' principle to permit standing." Br. 33.

Respondent's argument is entirely without precedent. Of necessity, respondent chooses to ignore that it must first cross the Article III threshold by showing standing before it can ever argue that The Steel Company cannot establish mootness. By reversing the constitutional order, respondent suggests there is an opportunity for Congress to circumvent Article III's standing requirements, because, according to respondent, Article III doctrines – standing, mootness, and ripeness – merge into one since they all "must, of necessity, be consistent with Article III." Br. 33. But it is beyond dispute that mootness addresses whether the discontinuation of a violation *after* suit is filed requires a dismissal, and has nothing to do with pre-complaint actions or omissions. *See, e.g., Gwaltney*, 484 U.S. at 66-67. It is also beyond dispute that Congress cannot alter Article III's requirements. *Raines*, 65 U.S.L.W. at 4708 n. 3.

Application of the voluntary cessation doctrine might make some sense in the traditional mootness context (if respondent had standing) if there was a danger The Steel Company would not file its future EPCRA forms once the litigation was dismissed. But there is no such danger. The Steel Company did not file earlier because it was *unaware* of EPCRA, not because it chose to "ignore" EPCRA, as respondent would have this Court believe. According to respondent's analysis, if it is "reasonable to expect" that a facility which comes into compliance with the CWA by investing in new equipment will not resume violating the Act "once the threat of a citizen suit abates," Br. 21, then why is it also not reasonable to expect that a company, once it becomes aware of EPCRA and invests the time and money needed to comply

with EPCRA's complex requirements, will continue to comply with EPCRA once a citizen suit is dismissed? Moreover, if it is "relatively easy to come into compliance with EPCRA on short notice," Br. 19, why does respondent repeatedly assert that The Steel Company pay penalties so that it will be deterred from "future wrongful conduct?" Br. 9, 35-36.[10] Indeed, respondent's main purpose behind its action for past violations appears to be its desire that The Steel Company be "punished," Br. 23, 34-35, compliance having been relegated to a distant purpose.

b. Another of respondent's main contentions is that Congress determined Article III's redressability requirement would be satisfied by the imposition of penalties for past EPCRA violations. Br. 35-36. While Congress may have "the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," *Defenders*, 504 U.S. at 580 (Kennedy, J., concurring), Congress was silent as to any possible deterrent effect of imposing penalties for past EPCRA violations. Respondent admits as much as it cites no such congressional articulation regarding EPCRA, and, instead, cites CAA legislative history. Br. 36.[11] While penalties assessed for a violation continuing after a citizen suit is filed may satisfy Article III's redressability requirement in a mootness context, *see Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109 (4th Cir. 1988),

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[10] Respondent also misreads EPA's estimate regarding Section 313 reporting burdens by failing to include the estimated hours required for "rule familiarization" and "compliance determination," two essential tasks in filing EPCRA forms. Br. 20 n. 10. The correct estimate is therefore not 74 hours per report in the first year as claimed by respondent, but 124.5 hours as shown in our opening brief. Pet. Br. 42.

[11] The history stems from Congress's amendment providing for penalties in CAA citizen suits to conform the CAA to RCRA, CWA and other environmental statutes. Contrary to respondent's suggestion, however, Congress did not discuss whether penalties for past violations would satisfy Article III's redressability requirement. S. Rep. No. 101-228, 101st Cong., 2d Sess. 373, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3756.

they cannot redress a plaintiff's injuries where there is no continuing violation.

c. Respondent also attempts to create an injury and redressability for itself by arguing that, as in qui tam actions, Congress provided an appropriate "incentive" to sue in the form of "costs of litigation." Br. 30-31.[12] But an EPCRA case is no different from any other; a plaintiff simply will incur some costs in determining whether it has a valid claim. Nothing in EPCRA or this Court's jurisprudence indicates that incurring pre-filing investigation costs and fees establishes an Article III injury where the plaintiff otherwise has no Article III case.

This Court has routinely held that a claim for costs and fees "is not part of the merits of the action" because it "does not remedy the injury giving rise to the action." *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). Respondent's attempts to distinguish this Court's cases on the issue are unavailing, Br. 30 n. 16, 37, because, under its analysis, an award of litigation costs and fees is never "wholly unrelated to the subject matter of the litigation." In essence, by claiming the first dollar of costs or fees it incurred established its injury, respondent wishes to eliminate the first prong of the Article III standing test. Under any fee-shifting statute, "any person," as respondent would have it, need establish only causation and redressability, having been relieved of the constitutional injury requirement.

For example, the Fair Housing Act, in part an informational statute like EPCRA, authorizes "any aggrieved person" to sue and also recover attorney's fees and costs. 42 U.S.C. § 3613(a)(1)(A), (c)(2). Under respondent's analysis, even if an injury had been fully remedied, a would-be plaintiff could

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[12] Respondent also attempts to accord EPCRA some special significance in that, under EPCRA, an award of litigation costs "is made to the plaintiff, not to the attorney." Br. 30. This makes EPCRA no different from any other fee-shifting statute, including all environmental citizen suit provisions, which award fees to the prevailing "party," *see, e.g.*, 33 U.S.C. § 1365(d), 42 U.S.C. § 3613(c)(2), yet another example of how Congress used its model in enacting EPCRA.

still establish an injury because he had incurred pre-filing investigation costs, which, according to respondent, are related to the subject matter of the litigation for purposes of Article III. Br. 37. It makes no difference to respondent if the injury sued on was wholly in the past, respondent's "revised" Article III no longer requiring the traditional injury. *But see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982) (plaintiffs alleged a "continuing pattern" of unlawful racial steering and were able to establish standing).

Perhaps realizing that, since it could not allege an ongoing injury, it in turn has no Article III case, respondent pleads "[i]t would be pointless to conclude that Section 326 is unconstitutional as written, but would become constitutional if Congress provided" a bounty. Br. 31-32. While not addressing whether the qui tam is constitutional, this Court recently acknowledged the differences in establishing Article III standing in environmental citizen suits and qui tam actions. *Defenders*, 504 U.S. at 572-73 (an environmental citizen suit "is not the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff.")[13] Respondent is not a qui tam plaintiff, and has no Article III injury.

2. Only ten years ago, the United States argued an environmental citizen suit plaintiff who alleges past violations cannot establish standing:

> A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to

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[13] Apparently, plaintiffs in *Defenders* did not consider respondent's argument worth mentioning and did not attempt to establish injury via ESA's fee-shifting provision.

> meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in any meaningful sense the citizen's alleged injuries.

Brief of the United States as Amicus Curiae at 21 n. 34, *Gwaltney*, 484 U.S. 49. In this case, the United States retreats from that position and now argues that even if a citizen plaintiff does not allege an ongoing violation, this Court should find the speculative possibility of *future* injury sufficient to support Article III standing. U.S. Br. 26-30 & n. 10.

The United States disputes that its position on Article III has changed. U.S. Br. 26 n. 10. In attempting to show consistency of its arguments, the United States cites a case, shortly after *Gwaltney* was decided, in which it was asked by this Court to address whether, in a CWA citizen suit, a court's imposing penalties for violations that *continued* after a complaint was filed abridged Article III's redressability requirement. Brief of the United States as Amicus Curiae at 7-14, *Simkins Indus., Inc. v. Sierra Club*, 491 U.S. 904 (1989). In *Simkins*, the plaintiff "alleged in good faith and proved a continuing violation within the meaning of *Gwaltney*." *Id.* at 7. Discussing redressability in a mootness context, the United States argued an imposition of penalties for violations existing when the complaint was filed, although cured prior to entry of judgment, did not violate Article III. More important to this case, despite how it now portrays its views on standing, the United States reiterated its *Gwaltney* position that Article III requires a citizen plaintiff to allege an ongoing violation; if there is no continuing violation, obtaining a judicial assessment of penalties cannot redress a citizen's alleged injuries. *Id.* at 13 n. 14.

In this case, however, the United States reverses course and asks the Court to erase the line that traditionally has separated pre- and post-complaint injuries and instead find that Article III's redressability requirement would be satisfied by a judicial assessment of penalties for wholly past violations. It essentially argues the mootness principles it asserted in *Simkins* are no different from the standing criteria it defended in *Gwaltney*. But the two are not the same, and the

United States' unprecedented position would require the Court to equate standing and mootness, two very different Article III doctrines.

The weakness of its argument is seen in its sole ground for distinguishing *Gwaltney* from this case: "the violation at issue cannot be said to be a nonrecurring one." U.S. Br. 26 n. 10. But its argument is disingenuous: one, respondent did not allege an ongoing violation as the *Gwaltney* plaintiff would. Two, as the United States uses the word here, *Gwaltney* would involve "recurring" violations because the plaintiff there alleged years of non-compliance with the CWA, and not a single instance, as the United States suggests. *Gwaltney*, 484 U.S. at 53 (between 1981 and 1984, defendant violated its permit over 150 times).[14] Mootness simply does not apply here, and respondent's and the United States' arguments have no constitutional grounding.

3. Finally, while a scarcity of government resources may be a legitimate justification for authorizing citizen suits for past violations as a policy matter, Br. 3, U.S. Br. 21, it is insufficient to confer Article III standing on respondent. This Court has emphasized this point on numerous occasions. In

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[14] In asking this Court to affirm the Seventh Circuit, and, in effect, eliminate the injury and redressability requirements in the standing context, the United States also invites the unwelcome consequences of undermining the doctrines of ripeness and mootness. If there is no injury requirement, a case is always ripe and never moot. *See* Marshall J. Breger, *Defending* Defenders, 42 Duke L. J. 1202, 1208 (1993). Nothing would prevent courts from entertaining collusive suits and issuing advisory opinions. *Id.* Congress could also enact statutes authorizing "any person" to sue and thereby overrule this Court's decisions regarding taxpayer standing and First Amendment challenges. *Id.* at 1208-09. The United States' position on standing here is a radical departure from its arguments in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), *Allen*, *Defenders* and others in which it argued against expanding Article III standing. It is also passing strange that the United States argued that the plaintiffs in *Spear* did not have Article III standing where there clearly was a continuing harm, but have no difficulty finding standing here where the alleged harm is wholly past.

Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 945 (1983), this Court explained that "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." *See also Valley Forge*, 454 U.S. at 484 ("To the extent the Court of Appeals relied on a view of standing under which the Art. III burdens diminish as the 'importance' of the claim on the merits increases, we reject that notion."). Indeed, "If passionate commitment plus money for litigating were all that were necessary to open the doors of the federal courts, those courts, already overburdened with litigation of every description, might be overwhelmed." *People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984).

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the Seventh Circuit Court of Appeals should be reversed, and the District Court's dismissal of CBE's complaint should be reinstated and affirmed.

Respectfully submitted,

SANFORD M. STEIN
Counsel of Record

LEO P. DOMBROWSKI
WILDMAN, HARROLD, ALLEN & DIXON
225 West Wacker Drive
Chicago, IL 60606-1229
(312) 201-2000
Counsel for Petitioner

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